UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

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The Campaign Finance "Reform" Bill

Prohibiting "Electioneering Communications" Means Imposing Political Censorship

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> — The First Amendment to the Constitution of the United States

The campaign finance "reform" bill, H.R. 2356, is premised on the idea that Americans spend too much of the wrong kind of money on political speech, especially television and radio advertisements. The bill proposes, therefore, to ban union and corporate money from being spent to utter the names of political candidates in the weeks immediately preceding elections, even when that speech does not expressly advocate the election or defeat of a candidate. The result is going to be a biennial plague of political censorship and silence.

H.R. 2356 gives birth to a new species of political speech, the "electioneering communication". One might suppose that something called "electioneering communications" would be highly protected under our laws because we are a free people and because the First Amendment to the Constitution exists principally to protect political speech.[1] To the contrary, however, the very purpose of this bill is

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[1] ". . . Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Although First Amendment protections are not confined to 'the exposition of ideas,' 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, of course includ[ing] discussions of candidates.' This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in [a 1971 case], 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo*, 424 U.S. 1,

to prohibit "electioneering communications".

Under the plain terms of sections 203 and 204 of the bill, an "electioneering communication" is defined as [1] a "broadcast, cable, or satellite communication" [2] made within 60 days before the candidate's general election or 30 days before the candidate's primary election [3] that refers to a "clearly identified candidate for Federal office" and, [4] unless the candidate is running for President or Vice President, "targeted to the relevant electorate" (meaning that it can be received by 50,000 or more persons in the relevant district or State).[2]

Initially, paragraph 2 of section 203 of the bill left open a crack for "electioneering communications" by nonprofit social welfare organizations (organized under §501(c)(4) of the Internal Revenue Code) and political organizations (organized under §527 of the Code[3]), if the communications were paid for exclusively by U.S. individuals (not corporations or labor organizations). However, when section 204 was added on the Senate floor, that opening was nailed shut for any "electioneering communication" by a §501(c)(4)- or §527-organization that is *targeted* to the relevant electorate. What section 203 originally offered, section 204 has taken away. The two sections now effectively cover all relevant communications because, when an organization has something to say about an issue and wants to name a Representative from California, it does not buy broadcast time in Connecticut, but in the pertinent media market in California.

Having given some background on H.R. 2356's rules on "electioneering communications", we turn now to (A) some of the bill's constitutional problems and (B) some of the deleterious effects that

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14-15 (1976) (*per curiam*).

[2] The bill also specifies what an "electioneering communication" does *not* include. The most important exclusion is for any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station" (unless the facilities are "owned or controlled by any political party, political committee, or candidate") At first glance, much of this provision appears innocuous, but what the provision makes clear is that the bill stigmatizes speech that does not originate with a media organization. For example, a media mega-corporation can broadcast whatever it likes (including express advocacy) whenever it likes (including the day before an election), but in the weeks leading up to an election, a small, nonprofit, ideological corporation cannot buy an ad that merely uses the name of a candidate in any context. This result is anomalous, legally and logically.

[3] During the decade of the 1990s, the Internal Revenue Code reported that about 140,000 organizations were registered as §501(c)(4) organizations each year. It is reported that the following organizations are registered under §501(c)(4): American United for Separation of Church and State, Christian Coalition, Citizens for a Better Government, League of Women Voters, National Association for the Advancement of Colored People, National Rifle Association, National Organization for Women, National Right to Life Committee, Sierra Club, and various veterans organizations — and, of course, tens of thousands of others.

will result from enactment of the bill.

A. Key Constitutional Problems With H.R. 2356

Sections 203 and 204 have king-size constitutional problems. Indeed, these problems probably will be fatal to these sections unless the Supreme Court revises its jurisprudence. Because the bill has a severability clause, sections 203 and 204 could be struck from the bill and other parts of the bill could still go into effect. Here are five potentially fatal legal problems:

A.1. Constitutionally Necessary Distinction Between Two Types of Advocacy

Sections 203 and 204 ignore the constitutionally mandated distinction between "express advocacy" and "issue advocacy" which was essential to the Court's holding in *Buckley v. Valeo*.[4] Sections 203 and 204 prohibit "refer[ring] to a clearly identified candidate for Federal office" whether or not that reference appears within a message of express advocacy ("Re-elect Roe") or a message of issue advocacy ("Call Roe") ("Defeat the Roe bill") ("Roe is a friend of the taxpayer") ("Roe cosponsored the bill"). The bill faces serious constitutional obstacles unless *Buckley* is revised or reversed, which is the earnest hope of many advocates of campaign finance "reform".

A.2. Constitutionally Necessary Distinction Regarding Corporate Structure

Sections 203 and 204 also ignore the constitutionally mandated distinction between ideological corporations and ordinary business corporations. In *Massachusetts Citizens for Life v. Federal*

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[4] In *Buckley*, the Supreme Court reviewed a provision of FECA that limited many individuals and groups to an expenditure of $1,000 per year "relative to a clearly identified candidate." 424 U.S. at 39 (1976). The Court said that it was "clear" that the $1,000 cap "limit[ed] political expression" which is "at the core of our electoral process and of the First Amendment freedoms." *Id*. The Court went on the say that the provision could be saved from invalidation "only by reading" it "as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id*. at 43. Perhaps the most quoted part of the *Buckley* opinion on this subject says, "We agree that in order to preserve the provision against invalidation on vagueness grounds, [it] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office. *Id*. at 44 at note 52. Footnote 52 says, "This construction would restrict the application [of the provision] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id*. at 44 note 52.

Election Commission, 479 U.S. 238 (1986), the Supreme Court refused to allow the FEC to apply FECA's spending prohibitions to a nonprofit, nonstock corporation that was created "for the express purpose of promoting political ideas" and that by its charter "cannot engage in business activities." *Id*. at 264. Additionally, the corporation had "no shareholders or other persons affiliated so as to have a claim on its asset or earnings," and it "was not established by a business corporation or a labor union," and did not "accept contributions from such entities." *Id*. When the bill first came to the Senate floor, section 203 contained a provision that at least acknowledged the rule of *Massachusetts Citizens for Life*, but with the addition of section 204 the distinction in the bill has been effectively eliminated.

A.3. Constitutionally Mandated Freedom of Association

The *Buckley* advocacy problem and the *Massachusetts Citizens for Life* structural problem are not the only constitutional problems with sections 203 and 204. Underlying those problems and others is the right of freedom of association, which also is lodged in the First Amendment. In *Buckley* the Supreme Court said:

> "The First Amendment protects political association as well as political expression. The constitutional rights of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas. . . ." *Buckley v. Valeo*, 424 U.S. at 15.

A.4. Similar Law Already Struck Down As Constitutionally Overbroad

In two recent cases, two organizations on opposite sides of the abortion issue persuaded two separate Federal district courts to strike down a Michigan regulation that, much like H.R. 2356, prohibited the use of a candidate's name or likeness in any communication made by a corporation or labor union during the 45 days before an election. *Right to Life of Michigan v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich., Sept. 16, 1998); *Planned Parenthood Affiliates of Michigan v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich., Sept. 21, 1998). One of the cases deserves to be quoted at length:

> "Through this Rule the State has chosen to subject soft money used to pay for issue advocacy advertisements to the disclosure requirements of [Michigan's Campaign Finance Act] if the ads include the name or likeness of a specific candidate 45 days prior to an election. The Rule is based upon the assumption that when advertisements mention the name of a candidate, they are not issue ads but rather candidate ads. . . . [The Rule] applies to all references to candidates, whether or not the reference can be construed as an exhortation to vote for or against the candidate. The Court cannot

accept the State's assumption that any mention of a candidate within 45 days of an election necessarily falls within the scope of express advocacy.

"The Rule prohibits a corporation from naming a candidate within 45 days of an election without regard to the content in which the name is found. The Rule prohibits statements urging the election or defeat of a candidate. In addition to prohibiting express advocacy, the Rule prohibits issue advocacy and non-advocacy as well. The Rule prohibits a statement that Candidate X introduced or sponsored specific legislation; that Candidate Y voted against specific pending legislation; or that Candidate Z had a birthday, was in an accident, or died. Because such information does not fall within even the broadest definition of 'express advocacy,' the Rule is clearly overbroad. The Rule prohibits any mention of a candidate's position on issues, and prohibits any mention of a candidate's stance with respect [to] a vote that is to be held within the 45-day period.

"In this case the censorial effect of the Rule on issue advocacy is neither speculative nor insubstantial. Samples of Plaintiff's communications published within 45 days of elections reveal that a wide range of topics that have previously been discussed would be prohibited by [the Rule], including articles that mention the sponsors, authors and supporters of specific pending bills, identification of those who testified at hearings, and interviews with candidates.

"In light of the guidance given in *Buckley* and its progeny, there can be no real dispute that [the Rule] is constitutionally overbroad. [The Rule] does not merely prohibit communications that expressly advocate the election or defeat of a clearly identified candidate. It prohibits any mention of the name of a candidate within 45 days of an election, regardless of the context in which that name is mentioned." *Right to Life of Michigan v. Miller*, 23 F. Supp. 2d at 768-69.

For the same reasons that were explicated by the district court in *Miller*, the constitutionality of sections 203 and 204 of H.R. 2356 is in grave doubt under current law.

B. Three Deleterious Effects of Enacting of H.R. 2356

B.1. Forbidden Words in Forbidden Speeches

The district court in *Right to Life of Michigan v. Miller* gave hypothetical examples of the types of speech that would be forbidden if corporations and unions could not use the name or likeness of a specific candidate — but the following chart gives actual examples from actual cases. The chart shows the kind of speech that the government has *unsuccessfully* sought to regulate or prohibit. If

H.R. 2356 is signed into law, these expressions of political opinion are the very kinds of *issue advocacy* that *could not* be paid for with corporate (including nonprofit corporate) or union dollars in an "electioneering" context.

When reading the chart, remember that such speech would be prohibited only if it were an "electioneering communication". For example, much of the speech shown in the chart was delivered by way of newspaper, pamphlet, or letter. Those particular modes of communication do not qualify as "electioneering communications" under H.R. 2356 because they do not use broadcast facilities. The chart shows the kinds of words that have been challenged in the past and that would be forbidden in the future if they met H.R. 2356's definition of "electioneering communications" as to source of funding, mode of communication, timing, relevant candidate, and target audience.

Ten Examples of Political Speech From Past Cases
That Will Be Forbidden to Corporate and Union Dollars
If H.R. 2356 Becomes Law

Speech From the Political Left	**Speech From the Political Right**
"Congressman William F. Ryan has been placed on the Honor Roll of The National Committee for Impeachment." *U. S. v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1143 (2d Cir. 1972).	"On 24 key votes, Congressman Jerome A. Ambro voted 21 times for higher taxes and more government." *FEC v. Central Long Is. Tax Reform Immediately Comm.*, 616 F.2d 45, 50-51 (2d Cir. 1980).
"Jesse Helms, Orrin Hatch, and Strom Thurmond must know that we are well-organized and prepared to defend the right to a safe, legal abortion." *FEC v. National Organization for Women*, 713 F. Supp. 428, 432 (D.D.C. 1989).	"Governor Bill Graves is a supporter of legal abortion. We are Kansans For Life – and it's our job to know who is pro-life and who is pro-abortion." *Kansans For Life, Inc. v. Gaede*, 38 F.Supp.2d 928, 929-30 (D. Kan.1999).
"The Reagan Administration poses an immediate and real threat to the economic rights of women everywhere." *Id.* at 431.	"Bill Clinton's vision for a better America includes giving homosexuals special civil rights. Is this your vision?" *FEC v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996).
"We urge the impeachment of Richard M. Nixon for high crimes and misdemeanors." *Nat'l Comm. for Impeachment, supra*, at 1143.	"We have an opportunity to deliver a verdict on the Clinton Presidency, and America's Christian voters must stand together." *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 57, 63-64 (D.D.C. 1999).

"4 more years of the Reagan Administration will destroy all hope for nuclear disarm-ament, peace abroad, and economic justice here at home." *FEC v. Survival Education Fund*, 65 F.3d 285, 288 (2d Cir. 1995).

"Call Senator Adelman and tell him that honest, working people have rights, too." *Wisc. Mfrs. & Commerce Issues Mobilization Council v. Wisc. Elections Bd.*, 978 F. Supp. 1200, 1203-03 (W.D. Wisc. 1997).

B.2. The Shadow of Censorship Across America

If H.R. 2356 is enacted into law, March 16 through March 27 and about the last three weeks in August will be *the only days* after mid-January of 2004 when corporations and labor unions will be able use their general funds to pay for a broadcast that names a "clearly identified candidate" for President or Vice President of the United States.

The following chart shows primary election dates for 2004. Remember that the rule of sections 203 and 204 of H.R. 2356 is that names, faces, or other identifying criteria of a "clearly identified candidate" for Federal office cannot be used during the 30 days before a primary election (or convention) and the 60 days before the general election (which is on Nov. 2, 2004), and that the concept of "targeted" communications is not relevant to races for President and Vice-President.

Therefore, beginning in mid-January, 30 days before the New Hampshire presidential primary, the names of presidential candidates will begin dropping off the air all across the country. As the weeks of 2004 roll by, censorship zones will pop up all across America as primary election dates approach for President, Senator, and Representative. Beginning at 12:00:01 a.m. on September 3, 2004 (60 days before the general election), censorship will be general throughout all the land.

State Primary Elections in the Year 2004[5]
(Under H.R. 2356, Blackout Dates Begin 30 Days Earlier)

February	**June**	**September**
10(?): NH presidential primary	1: AL, MS(?), NM, SD	7: AZ, NV
March	8: IA, ME, MT, NJ, ND, SC, VA	11: DE
2: CA, CT, NY, OH(?)	22: UT	14: MD, MA, MN, NH, RI, VT, WI
9: OK, TN, TX	**July**	18: HI
16: IL	20: GA	21: WA(?)
April	**August**	**October**
27: PA		

[5] Dates were calculated from formulae at THE BOOK OF THE STATES 166-67 (2000-01). Because of election-day changes in presidential election years (for "Super Tuesday", for example), the list is not error-free.

May	3: KS, MI, MO	2: LA
4: IN, NC	10: CO	12: AR
11: NE, WV	17: WY	
18: OR	24: AK	
25: ID, KY	31: FL	

B.3. Protecting Incumbents and Office-Holders Running For Other Offices

Sections 203 and 204 are written in ostensibly neutral terms, but they will have the powerful effect of protecting incumbents and other members of the political class. When names cannot be uttered, persons with political records get substantially greater benefits than novices. Incumbents and other office-holders tend to have far higher name recognition among voters than non-incumbents, but incumbents and other office-holders also have voting records. If the names of neither incumbents, other office-holders, nor novices can be spoken, then the experienced and successful politicians retain their high name recognition while their records get immunized from attack.

Of the 434 members of the Senate and House of Representatives who ran for re-election in 2000, 419 won. That's a re-election rate of 96.5 percent.[6] Sections 203 and 204 cover the names of all of those incumbents — and thereby help to shield their records.

In the Senate in 2000, 34 seats were at stake. Of the 68 leading candidates, only 12 were not holding office or had not held office as U.S. Senator, U.S. Representative, Governor, or in another State office (or as a prominent spouse of an office-holder). Therefore, 82 percent of Senate candidates had public records, but sections 203 and 204 of the pending bill will protect their names during the final, critical weeks of their elections. Now-Senator Corzine was the only political novice to be elected to the Senate, and he spent $65 million of his own money to win. Spending one's own money is constitutionally protected under *Buckley* (because there is no danger of corrupting oneself, 424 U.S. at 51-54), but the Constitution also protects the rights of the rest of us to associate together and speak as a group.

C. Conclusion

H.R. 2356 will censor political speech; therefore, the bill has enormous constitutional problems. Both the Congress and the President, not just the judiciary, have an obligation to consider those constitutional problems — and to avoid them if they agree that the bill censors that speech that is at the core of the First Amendment. Politically, the bill will further skew the system in favor of big media and incumbents and other office-holders.

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[6] Ron Faucheux, "What Mattered Most" in *CQ Monitor News*, Dec. 14, 2000.

The bill will return to the Senate floor next week.

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[Citations, internal quotation marks, and ellipses were omitted in some quotations. In the chart on page 6, the speeches have been severely condensed from the originals.]